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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1964.

ROBERT G. REGAN CO., a corporation,

Respondent.

vs.

CAESAR A. FIOCCHI and CHARLES FIOCCHI, co-partners, d/b/a Caesar Fiocchi Company, and SEABOARD SURETY COMPANY, a corporation,

Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1964.

No. 1224

ROBERT G. REGAN CO., a corporation,

Respondent,

vs.

CAESAR A. FIOCCHI and CHARLES FIOCCHI, co-partners, d/b/a Caesar Fiocchi Company, and SEABOARD SURETY COMPANY, a corporation,

Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES:

SUMMARY OF ARGUMENT.

No Constitutional Or Federal Question is Presented.

A. The Petitioners' sole alleged ground for the issuance of a Writ of Certiorari is based on a fictitious fact.

B. The Petitioners did not raise the issue during the trial because it did not exist and the Trial Court, therefore, properly denied the Petitioners' Motion for a New Trial.

C. It is improper for the Petitioners to raise an alleged federal question at this time because the Petitioners did not raise the issue claimed in either their Brief and Argument addressed to the Illinois Appellate Court or their Petition for Leave to Appeal to the Illinois Supreme Court.

REASONS FOR DENYING THE WRIT.

No Constitutional or Federal Question is Presented.

A. The Petitioners' sole alleged ground for the issuance of a writ of Certiorari is based on a fictitious fact.

The Petitioners' stated ground for the issuance of a Writ of Certiorari is presented at the bottom of Page 2 of their Petition filed in this Court:

> "The basis alleged for error is that the Trial Judge denied Petitioners access to certain records of the Federal Housing Authority that they had subpoenaed for use at the trial by way of subpoena duces tecum."

At Page 6 of Petitioners' Brief, it is stated:

> "In putting on its case, Respondent called one Erich Olsen as a witness. Olsen testified that he was the FHA Inspector on the job and had refused to give it final certification due to the faulty condition of the veneer work."

At Page 7 of Petitioners' Brief, it is stated:

> "Petitioners had no intention of calling Inspector Olsen as a witness but merely sought to inspect his file on the project and to use such documents as might be relevant to impeach his conclusion through the testimony of Petitioners' own expert witnesses."

The Petitioners, in their Motion for New Trial, stated the following reason as error:

> "6. That the Trial Court erred in permitting witness Erich Olsen, FHA Inspector, to testify in the absence of his having produced records and documents pur-

suant to subpoena duces tecum served by defendants in the office of the FHA in Chicago, Illinois on June 2, 1962. That by denying the defendant access to said records, the defendants' right of cross-examination of said witness was severely limited."

It should be noted that the Petitioners have changed their position regarding their proposed use of the allegedly subpoenaed documents in their Petition before this Court as distinguished from their position as stated in their Motion for New Trial. In their Motion for New Trial, they claim that by denying the defendants access to the records, the defendant's right of cross-examination of the witness, Erich Olsen, was severely limited.

The fictitious fact stated by the Petitioners in their Motion for New Trial, as well as their argument to this Honorable Court, is that the Petitioners did not object to the testimony of Erich Olsen, nor did the Petitioners object to his not having produced documents under a subpoena duces tecum allegedly served on him. In fact, at Page 36 of the Abstract of Record, prepared by the Petitioners, is a stipulation between counsel, read to the Jury, which stated:

"It is stipulated and agreed between the parties that Mr. Olsen, the F.H.A. Inspector who testified here yesterday, prepared a report after his inspection of the work and sent that report to the Glenview Naval Homes, Inc. In that report he stated that the brick would have to be taken down and ties would have to be put in according to the specifications and the brick put back up to satisfy the F.H.A. on this project. That thereafter that same report was forwarded by Glenview Naval Homes, Inc. to the Plaintiff in this case and subsequently by the Plaintiff to the Defendant."

To further demonstrate the fictitious basis of the Petitioners' argument is the demonstrable fact that an examination of the Petitioners' Abstract of Record discloses that in the praecipe ordered by the Petitioners from the Clerk of the Trial Court, for the purpose of appeal, the Petitioners did not request the Clerk to include in the record the subpoena duces tecum, if in fact they did serve a subpoena duces tecum on the witness (Abstract of Record, Page 17). In the entire 53-page Abstract prepared by the Petitioners in this cause, there is not one iota of evidence or record to substantiate Petitioners' claim that they objected to Mr. Olsen's testimony in the Trial Court, or that a subpoena duces tecum was served on the witness, or that Petitioners made any objection, reference or argument to the Court that the witness had failed to produce documents, or that the Petitioners were in any way prejudiced by his failure to produce them.

The basis alleged for error by the Petitioner and the sole reason urged for the issuance of a Writ of Certiorari is entirely unsupported by the record and the Petition should therefore be denied.

B. The Petitioners Did Not Raise The Issue During the Trial Because It Did Not Exist And The Trial Court, Therefore, Properly Denied The Petitioners' Motion For a New Trial.

It is highly important to recognize that the Petitioners made no objection to the testimony of the FHA Inspector, Erich Olsen, and in fact even stipulated to parts of his testimony. How, under these circumstances, is a Trial Judge to know that records have been subpoenaed or that counsel considers the records so important that he cannot fairly and fully represent his client without the records? Certainly it is incumbent upon counsel to raise the question and appropriate objection during the trial and not

raise the issue for the first time after the trial. The orderly, proper and fair administration of justice demands that timely objections be made in order that the court may protect the interests of all litigants.

On the record presented, it is respectfully submitted that the Trial Court properly denied the Petitioners' Motion for New Trial.

C. It Is Improper For The Petitioners To Raise An Alleged Federal Question At This Time When The Petitioners Did Not Raise The Issue Claimed In Either Their Brief and Argument Addressed To The Illinois Appellate Court Or Their Petition For Leave To Appeal to The Illinois Supreme Court.

A party desiring to preserve a question for review in an Appellate Court must make appropriate and timely objection in the trial court in order to obtain a ruling of the Court thereon and to permit the error or defect complained of to be obviated or corrected, and a failure to object when necessary to preserve a question for review constitutes a waiver of the objection.

Goldberg v. *Capitol Freight Lines, Ltd.*, 47 NE 2d 67 at 71; 382 Ill. 283.

Forest Preserve District of Cook County v. *Lehman Estate*, 58 NE 2d 538 at 545; 388 Ill. 416.

Goldschmidt v. *Chicago Transit Authority*, 82 NE 2d 357 at 360 and 361; 335 Ill. App. 461.

An Appellate Court will not consider an objection to the incompetency of a witness to testify when such objection has not been properly made in the court below.

Bel-Clark Bldg. Corp. v. *Glauner*, 72 NE 2d 645; 331 Ill. App. 179.

Montgomery v. *Checker Taxi Co.*, 57 NE 2d 231, 324 Ill. App. 83.

Objections concerning errors occurring in the examination of witnesses during the course of a trial or hearing, whether the examination be direct, redirect, or cross, should be properly made at the trial or hearing in order to give the court or master an opportunity to rule thereon, and objections not made at that time will not be available on appeal.

Sankey v. *Interstate Dispatch*, 90 NE 2d 265 at 269; 339 Ill. App. 420.

Gillett v. *Healy Subway Construction Corp.*, 67 NE 2d 887 at 890; 329 Ill. App. 263.

An objection to the mode or conduct of the trial or hearing cannot be raised for the first time in an Appellate Court, but must first be properly made at the trial or hearing and pressed on the attention of the Court and a ruling obtained thereon.

Hood v. *Commonwealth Trust & Savings Bank*, 34 NE 2d 414 at 423; 376 Ill. 413.

Gaffner v. *Meier*, 82 NE 2d 818 at 819 and 820; 336 Ill. App. 44.

DeFrates v. *Roland*, 93 NE 2d 153, 341 Ill. App. 69.

The Petitioners' request for a Writ of Certiorari is unsupported by either the record or the well-founded law. The Petition should, accordingly, be denied.

CONCLUSION.

The Petition for Writ of Certiorari should be denied for the following reasons:

1. The orderly and fair administration of justice requires that objections be timely made during the course of a trial in order that the Trial Judge may fully protect the interests of the litigants and obviate any error that may occur.

2. At the trial court level, the Petitioners made no objection to the inability of the FHA witness, Erich Olsen, to produce certain documents under a subpoena duces tecum allegedly served on the witness.

3. The basis alleged for error by the Petitioners, and the sole reason urged for the issuance of a Writ of Certiorari is entirely unsupported by the record. The Petitioners did not raise the alleged federal question in their Brief and Argument to the Illinois Appellate Court nor did they raise the question in their Petition for Leave to Appeal addressed to the Illinois Supreme Court. The law is well established that such error cannot be raised for the first time on appeal.

It is therefore respectfully submitted that no federal or constitutional question is presented and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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